General Processing Corporation *and* United Steelworkers of America, AFL-CIO. Case 10-CA-16028

29 September 1983

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 22 November 1982 Administrative Law Judge James L. Rose issued the attached Supplemental Decision in this proceeding.[1] Thereafter, the General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The underlying Decision and Order Remanding Proceeding appears at 263 NLRB 86 (1982).

[2] The General Counsel and the Charging Party have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: On July 30, 1982, the Board remanded this matter to me for further evaluation of the allegation that the Respondent refused to hire employees of its predecessor in violation of Section 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*

In brief, I had concluded that at certain material times a majority of employees in the appropriate bargaining unit had been employed by the Respondent's predecessor in the bargaining unit. Accordingly the Respondent was obligated on demand to recognize United Steelworkers of America, AFL-CIO (herein the Union). I further concluded that the Respondent did not violate Section 8(a)(3) in its failure to hire certain employees of the predecessor. The Board held that the majority finding erroneously included five individuals whom the Respondent's president had testified he knew had been employees of the predecessor.[1] Since my determination that the Respondent's hiring decisions were not discriminatorily motivated was based in part on the conclusion that a majority of the bargaining unit employees in fact had been employed by the predecessor, the Board remanded the matter for further evaluation of the discrimination issue untainted by this erroneous conclusion.

Having reconsidered the record in light of the Board's Decision and Order, including affirmed portions of my original decision and the credibility findings therein, I hereby issue the following:

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND FACTS

As more fully set forth in my initial decision, this dispute was occasioned by the purchase by the Respondent of a manufacturing plant owned and operated by Philips Industries, Inc. (herein Philips), in June 1980.

Joseph Wibel, the president and principal stockholder of Respondent, had worked at this plant when it was owned and operated by his father. (It was apparently during this period that the Union became the bargaining representative.) In October 1965 Philips purchased the business from Wibel's father, with Wibel continuing on as the executive vice president and plant manager for about a year. He was then promoted to other positions of responsibility with Philips but finally left that employment in 1974. In early 1980[2] Wibel returned to Crossville with the intent of purchasing the business from Philips.

Following negotiations, and his review of records submitted by Philips, Wibel decided to purchase the Company, believing he could make it profitable but that to do so he would have to reduce direct labor costs as a percentage of sales. Thus it was Wibel's intention to begin operation with a substantially smaller work force than that employed by Philips.

The most recent seniority roster from Philips, dated March 17, lists 166 employees in the bargaining unit, including 9 truckdrivers. Also in evidence is a list of employees hired by Wibel which shows that the first 2 bargaining unit employees began work on June 9, another 7 on June 12, 2 more on June 13, 31 on June 16, and so on to August 21 at which time there were 85 employees in the bargaining unit.

[1] *Inter alia*, the Board found no persuasive evidence that either Clifford Campbell or Dallas Hamby in fact worked as a unit employee for the predecessor. On this point, in its brief to the Board, the Respondent did not contest the inclusion of Hamby, but argued, instead, that M.C. Deck, Jr., should not have been included.

[2] All dates are in 1980.

II. ANALYSIS AND CONCLUDING FINDINGS

It is alleged that, on June 9 and 10, employees of Philips in the bargaining unit made application for employment with the Respondent. It is also alleged that the Respondent refused to hire employees of Philips who made such application because of their membership in the Union and to avoid the resultant obligation to bargain with the Union had a majority of its employees formerly worked for Philips in the bargaining unit.

The Respondent admits that some former employees of Philips made application for employment and further admits that some of those who made application were not hired.

The record shows that at least 46 former Philips employees made application and were not hired. Evidence also establishes that at least 36 former Philips bargaining unit employees were in fact hired by the Respondent between June 9 and August 21.

Notwithstanding that a substantial percentage of the Respondent's employees had worked in the Philips bargaining unit (albeit not a majority), the General Counsel contends that the Respondent refused to hire others because of their union membership in order to avoid having to bargain with the Union.

I do not believe that the evidence preponderates in favor of concluding that Wibel was motivated by antiunion consideration in his decisions concerning whom to hire and when.

The General Counsel's argument is based primarily on the fact that numerous Philips employees applied for jobs and were not hired. Since they formed an experienced and skilled work force, it should be inferred that failure to hire some number of them was based on antiunion considerations. The General Counsel further contends that the antiunion motivation was shown by a statement made by Zack Dixon to Jessie Davidson to the effect that Wibel stated that he was going to operate nonunion (a statement I do not believe occurred in the precise manner testified to by Davidson). Further Wibel admitted he knew he would have to bargain with the Union if he hired a majority of Philips employees.[3] Thus his further admission that he intended "initially" to operate nonunion means that Philips employment was a motivating factor in denying a job to 1 or more of the 46 applicants.

The Respondent's defense is based primarily on the testimony of Wibel who stated that whether or not employees had been a member of the Union was not a consideration in his hiring decisions. He testified at length concerning the reasons why he hired whom he did.

Although the General Counsel may have established a *prima facie* showing that some employees were not hired because they had worked for Philips, I conclude that the Respondent proved Wibel's hiring decisions were not discriminatorily motivated.

First, a successor employer has a right to choose his own work-force, limited only by his duty not to discriminate against employees of the predecessor for reasons proscribed by the Act. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249 (1974). Thus exercising this right cannot be evidence of illegality.

Second, there is no evidence that the Union sought to have its members (or unit employees) hired by Wibel. Philips' intention to close on May 30 having sold the plant "to another party" was communicated to the Union by phone and telegram on May 22. That Wibel was the other party was well known to union members, at least by rumor, *infra*. Yet, the only move made by the Union was a letter dated June 10 wherein it was demanded "that you recognize this Agreement (the contract with Philips), in its entirety." This demand was received on June 13, by which time hiring was in progress.

In order to conclude that Wibel was motivated by antiunion considerations, I would have to discredit his testimony in substantial part. There is, however, little basis in the record to do so. I found his demeanor positive and his testimony direct and straightforward. Indeed, on examination by the General Counsel, he made admissions on material points which were adverse to his interest.

Wibel testified that most employees hired between June 9 and August 21 were either known to him personally from his previous work at Philips, were recommended to him by Bob Black (a former Philips supervisor), or had been promised jobs by Zack Dixon in May when, at Wibel's instructions, Dixon set about to find employees. A few were from other sources: The first two came with Wibel from Indiana; one was recommended by the banker from whom Wibel borrowed money to buy the business; and two were recent graduates of a local vo-tec school. Finally Wibel testified he was advised by Dixon that on three occasions Dixon had "tried to give applications to former employees of Philips Industries and he was told that they would not accept them and would not come to work there and they would never fill out an application and in addition to that heard that rumor all over town and I believed it." This was corroborated by Dixon.

Dixon, Wibel's uncle by marriage and a then unemployed construction superintendent, was appointed personnel manager in May and told by Wibel to secure a work force. Before Philips closed, he contacted at least three of its employees (Jessie Davidson, Earl Dodson, and Danny Joe Dixon) asking them to make applications. Zack Dixon, credibly I conclude, testified that in his conversations with them he was told in effect that they did not have to fill out applications and would not do so, that when Wibel reopened the plant they would be employed automatically. And he contacted Burl Goss, a Philips employee on layoff, who took an application. Subsequently Davidson, Dodson, and Dixon did apply. Among others, Davidson, Dixon, and Goss were hired.

Dodson denied the substance of Zack Dixon's testimony concerning their conversations. However, he did testify:

> Q. Did you ever hear any conversation about what was going to happen to the Union contract?
>
> A. Well, I figured that they would get—I figured that there would still be a Union. I didn't know.

[3] This is not the same as admitting he knew he would have to recognize the Union if a majority of his employees had formally worked for Philips in the bargaining unit. And he credibly testified that for economic reasons he intended to begin with a substantially reduced work force—by August 21 less than half that employed by Philips.

Q. And you figured there would still be a Union contract too didn't you?

A. Yes.

And on May 22, a telegram was posted on the plant bulletin board from the Philips president advising that Philips had determined to terminate operation of the Company effective May 30 but would recognize its continuing obligation under the contract with the Union through August 15.

Thus the documentary and testimonial evidence of the General Counsel's witnesses support the testimony of Dixon that the Philips employees, at least through the time that Wibel reopened the plant, felt that when he did so, the union contract would continue to be in effect and that they would be reemployed automatically. During May, I find, Philips employees had refused to file applications though offered the chance by Dixon. Not until June 9 did many of the former Philips employees file applications. By that time, Dixon had received applications from a number of non-Philips employees in the community to whom he had promised jobs. In addition, Wibel had thoughts as to some people he wanted to hire.

Thus on June 9, after receiving some 600 applications for approximately 70 jobs to be filled over the next 2 months, Wibel, along with other management personnel, undertook to make decisions about whom to hire and when. It is credible that Wibel believed, as Dixon had reported, that Philips employees would not make application. Further it was not so unreasonable to honor Dixon's promises of employment as to imply a proscribed motive. The individuals Dixon had promised jobs became the bulk of the nonskilled category of employees hired on June 16. However, of the skilled employees, 25 of the 31 were former Philips employees who were hired on the recommendations of former Philips supervisors and were generally know to Wibel himself.

Upon these facts, I cannot conclude that the hiring procedure was so unreasonable as to require inferring that it was a pretext to hide an unlawful motive. Thus I do not infer that Wibel's method of putting on the work force implies that he was motivated by unlawful considerations.

In addition, there is no evidence of animus against unions on the part of Wibel, Dixon, or any other management person. Wibel signed the first two collective-bargaining agreements with the Union on behalf of management. There is no evidence that when the Union first organized the employees of Philips' predecessor (the company owned by Wibel's father for which Wibel was working as the plant manager), or later, that Wibel had anything but a amicable relationship with the Union. There is just simply no evidence in this record to support the conclusion that Wibel was so opposed to bargaining with the Union that he would commit an unfair labor practice of the dimensions alleged by the General Counsel to avoid it. Wibel admitted that his management philosophy was to have a well paid work force, but then require employees to work the whole time, and they would not want a union. Such, however, does not show an unlawful motive.

And on this matter of animus, it is noted again that Jim Gist, a former Philips employee, when applying for a job said to Wibel, "Now, I know and you know that I've led these people out of here more times than anybody in the world but I want a job here and you know that I'm a good worker." Wibel agreed that Gist was a good worker and he gave him a job, against the advice of other management personnel. A company president who has animus against labor organizations and is anxious to avoid the effects of collective action by employees would scarcely hire someone he knew to have been a strike leader. And, the documentary evidence shows that there were at least three strikes in the previous 5 years, two economic and one wildcat, all of which had a substantial impact on the Company's gross sales.

Similarly, Elmer Davis, who was then vice president of the Union and for many years had been an officer, which Wibel knew, was hired. I just do not believe on this record it can be concluded that Wibel harbored sufficient animus against the Union, or labor organizations in general, to infer that his hiring decisions were necessarily motivated by antiunion considerations.

The General Counsel contends that having a skilled work force available and not utilizing it implies that the Respondent was discriminatorily motivated; however, as noted above, the skilled positions were generally filled by Philips employees with the nonskilled jobs generally filled by non-Phillips employees. Though there is some evidence that employees, particularly non-Philips employees who were hired for unskilled jobs, have made production mistakes, the record also supports a conclusion that production mistakes had been fairly common, and that those now being made are not limited to non-Philips employees. The argument that Wibel eschewed a skilled work force is not, I conclude, persuasive in these circumstances.

The Board has rejected my conclusion that the Respondent employed a majority of former Philips employees in the bargaining unit at material times, and thus was obligated to recognize the Union. Nevertheless, that a substantial percent of his work force was always former Philips employees tends to militate against finding that he unlawfully attempted to avoid having to deal with the Union. Indeed, on June 12 (the day before the Union's demand was received but 2 days after it had been sent) Wibel had hired five former Philips employees of nine then in the bargaining unit.[4] And thereafter Wibel's employee complement always included from 40 to 45 percent former Philips employees.

Though there are some facts which tend to show that Wibel was motivated in his hiring by a determination to avoid recognizing the Union, on balance the total credible evidence in this record proves he was not.[5] I there-

[4] This number includes M. C. Deck, Jr., whom Wibel testified he knew worked for Philips in the "QC department." On the seniority roster is an M. C. Deck, hired May 10, 1976, as well as a Marvin C. Deck, hired March 24, 1980.

[5] Compare *Lowe's Barbeque Restaurant No. 62*, 245 NLRB 78, 80 (1979), where the new owner's "failure to explain his unusual hiring procedure (not having the restaurant named in advertisements and conducting interviews at a motel some distance away), coupled with his lack of

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fore conclude that the Respondent did not violate Section 8(a)(3) of the Act in its hiring practices and was not a successor obligated to recognize and bargain with the Union. *Marriott Corp.*, 251 NLRB 1355 (1980).

Upon the foregoing supplemental findings of fact and conclusions of law, as well as the initial findings of fact and conclusions of law in JD-492-81, as modified by the Board's Order in 263 NLRB 86, I issue the following recommended:

ORDER[6]

The complaint is dismissed in its entirety.

candor regarding the interviewing process, his demonstrated union animus, and his handling of the applications of Wadsworth, Logan, and Porter (three predecessor employees) as discussed below warrant the inference that the hiring procedure was designed to conceal from the former Hayward employees the fact that Kallmann was hiring."

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.